Supreme Court, U.S.
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No. 02-

IN THE

# Supreme Court of the United States

KENNETH SCOTT NIVENS,
GLEN LANCE MANERS,
TERRI LYNN STORK,

*Petitioners*,

*v.*

PETER S. GILCHRIST, III,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In 1997 North Carolina's highest court rejected a claim that an excise tax on the possession of unauthorized substances by drug dealers is a criminal penalty subject to procedural safeguards and democratic constraints guaranteed by the U.S. Constitution. In 1998, the Fourth Circuit respectfully disagreed and held that the drug tax is a criminal penalty that triggers these constitutional rights. In 2000, the Fourth Circuit held that habeas relief was not available because North Carolina's view of the drug tax was reasonable, albeit incorrect. The question presented is whether a colorable double jeopardy claim is an extraordinary circumstance justifying federal court intervention pursuant to the Civil Rights Act of 1864 in a state prosecution to the extent necessary to determine the merits of the federal double jeopardy claim where the state's highest court has already taken the position that the drug tax is not a criminal penalty and the claimants facing trial have paid the drug tax?

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Nivens, Maners, and Stork respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 319 F.3d 151 (4th Cir. 2003). The opinion of the district court (App., *infra*, 25a-34a) is unreported.

## STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on February 11, 2003. A petition for rehearing was denied on March 11, 2003 (App., *infra*, 35a-36a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are set forth in the appendix. App., *infra*, 37a-49a.

## STATEMENT OF THE CASE

1. The *Younger* abstention doctrine allows the federal court to abstain from intervening in a state proceeding, except under extraordinary circumstances. *Younger v. Harris*, 401 U.S. 37 (1971). The federal court takes into consideration equity, comity, and federalism in determining whether abstention is advisable. *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983).

Under federal circuit law, the court's decision to abstain is reviewed for abuse of discretion. *Martin Marietta Corp. v. Md. Comm'n on Human Rel.*, 38 F.3d 1392, 1396 (4th Cir. 1994). Under federal circuit law, abstention is appropriate where the availability of a remedy in the state proceeding depends on the state's highest court reversing itself. *Leonard v. Hammond*, 804 F.2d 838, 840-41 (4th Cir. 1986). *See also Duty Fee Shop v. Administracion De Terrenos De Puerto Rico*, 889 F.2d 1181, 1183 (1st Cir. 1989); *Dubinka v. Judges of Superior Court*, 23 F.3d 218, 224 (9th Cir. 1994); *Hansel v. Town Court of Springfield, N.Y.*, 56 F.3d 391, 394 (2d Cir. 1995).

In *Gilliam v. Foster*, 75 F.3d 881 (4th Cir. 1996) (en banc), the court of appeals held that a state defendant's double jeopardy claim "is an extraordinary circumstance warranting federal court equitable intervention" in the state criminal proceeding. *Id.* at 904. The state trial court had declared a mistrial and had begun retrial when the federal appellate court ordered a stay to consider whether the second trial violated the federal double jeopardy right. The federal court of appeals stated that a colorable double jeopardy claim was a "preeminent example of one of the very few extraordinary circumstances justifying federal court intervention in a pending state criminal proceedings." *Ibid.*

2. On July 8, 2000, Nivens, Maners, and Stork were arrested and ecstasy pills seized. The North Carolina Department of Revenue assessed drug taxes on the ecstasy possessed by Nivens, Maners, and Stork and obtained a judgment against them. The tax lien was promptly satisfied. The State then indicted Nivens, Maners, and Stork for various offenses related to the possession of the ecstasy that was taxed.

Nivens, Maners, and Stork filed a federal lawsuit under the Civil Rights Act of 1864 seeking to enforce their federal constitutional right against double jeopardy by means of a preliminary and permanent injunction prohibiting the state prosecutor from prosecuting them and all similarly situated individuals. They alleged in their complaint that extraordinary circumstances existed in that there is a conflict between federal and state law as to the North Carolina drug tax.

Under North Carolina law, the North Carolina drug tax is not a criminal penalty. *See State v. Crenshaw*, 144 N.C. App. 574 (2001); *State v. Manning*, 139 N.C. App. 454 (2000); *State v. Wambach*, 136 N.C. App. 842, *review denied*, 353 N.C. 273, *aff'd*, 353 N.C. 449 (2000); *State v. Woods*, 136 N.C. App. 386, *review denied*, 351 N.C. 370 (2000); *Milligan v. State*, 135 N.C. App. 781 (1999), *review denied*, 351 N.C. 358, *cert. denied*, 531 U.S. 819 (2000); *State v. Adams*, 132 N.C. App. 819, *review denied*, 350 N.C. 836, *cert. denied*, 528 U.S. 1022 (1999); *State v. Creason*, 123 N.C. App. 495 (1996), *aff'd per curiam*, 346 N.C. 165 (1997); *State v. Ballenger*, 123 N.C. App. 179 (1996), *aff'd per curiam*, 345 N.C. 626, *cert. denied*, 522 U.S. 817 (1997); *State v. Morgan*, 118 N.C. App. 461 (1995). Changes to the drug statute are not analyzed in state court because of binding precedent from the state's highest court holding that the original drug tax was not a criminal penalty. *See, e.g., State v. Crenshaw, supra.*

Under federal law, the North Carolina drug tax is a criminal penalty. *See Vick v. Williams*, 233 F.3d 213, 219 n.4 (4th Cir. 2000) (1996 drug tax assessment) ("the continuing validity of our decision in *Lynn v. West* is not called into question by our decision today."); *United States v. Johnson*, 37 Fed. Appx. 599, 2002 WL 384134 (4th Cir. 2002)

(unpublished) (1997 drug tax assessment); *United States v. Anderson*, 215 F.3d 1321, 2000 WL 620308 (4th Cir. 2000) (table) (1996 conviction); *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998). *Lynn v. West* rejected the conclusions of the state's highest court based upon an analysis of the drug tax under this Court's precedent in *United States v. Hudson* and concluded that "although nominally labeled an 'excise tax,' the Drug Tax is enforced only against those arrested for drug crimes, and – unlike routine license and excise taxes – payment of the tax confers no legal privilege to possess or sell." *Lynn*, *supra*, at 592 n.10. The amended tax rate and other adjustments to the tax statute do not alter the essential character of the drug tax.

The Fourth Circuit does not afford state defendants a federal habeas remedy with regard to the drug tax issue once state remedies have been exhausted because the state view of the drug tax is reasonable. *Vick v. Williams*, 233 F.3d 213 (4th Cir. 2000).

In the instant case, the district court granted the respondent's motion to dismiss under the *Younger* abstention doctrine. The district court reasoned that the plaintiffs' double jeopardy claim did not involve extraordinary circumstances because the plaintiffs had not yet suffered a criminal trial, double jeopardy had not yet attached because a jury had not yet been sworn, and the tax assessment was not a prosecution.

3. The court of appeals affirmed. The court of appeals declined to reach the double jeopardy claim. The court of appeals also declined to resolve the issue of whether abstention is appropriate after Nivens, Maners, and Stork exhaust their state remedies.

The court of appeals held that a colorable double jeopardy claim is not an extraordinary circumstance exception to the *Younger* abstention doctrine and that the likelihood of success of the claim is the appropriate focus of the inquiry. The court of appeals applied a balancing test similar to that used to determine whether to grant a temporary stay and preliminary injunction pending resolution of the merits of a case. The court of appeals stated that there was a substantial likelihood that the petitioners' prosecution was not a violation of double jeopardy because of a 1995 amendment that reduced the tax rate and because the tax assessment was part of the pending proceeding and thus not a prior proceeding implicating double jeopardy and did not involve a prior trial.

The court of appeals stated that the petitioner's reliance on *Gilliam v. Foster* for the proposition that a colorable double jeopardy claim is an extraordinary circumstance was misplaced. The court emphasized that in *Gilliam* there was a state trial followed by an attempt at a second state trial. The court explained that the likelihood of success standard it applied in *Gilliam* to decide whether a temporary stay was appropriate was the approach prescribed in *Younger* in determining whether to abstain.

## REASONS FOR GRANTING THE PETITION

The court of appeals held in this case that the district court has discretion to abstain from asserting jurisdiction granted under the Civil Rights Act of 1864 for persons who have raised a colorable sanctions-variety double jeopardy claim that will be summarily rejected in the state criminal proceeding due to binding precedent from the state's highest court. That holding conflicts with decisions in other circuits. The Fourth Circuit's decision is also incorrect. The *Younger* abstention doctrine is a legal standard for evaluating equity, comity, and federalism that is subject to *de novo* review rather than a matter of discretion. Contrary to the court of appeal's view, the doctrine cannot serve to bind federal courts to state precedents nor eliminate a federal statutory remedy for colorable claims of sanction-variety double jeopardy claims. Forcing a trial upon the previously sanctioned petitioners, state court, jurors, witnesses, and prosecutor, before addressing the merits of the double jeopardy claim, would be inefficient. Forcing the previously sanctioned petitioners to take their case through the state system, ultimately petition the state's highest court and then this Court, and have no federal habeas remedy because the state's interpretation of the federal double jeopardy right is reasonable albeit in error denies the petitioners their rights that Congress sought to protect under the Civil Rights Act and that federalism was designed to safeguard. Review by this Court is therefore warranted.

## A. The Fourth Circuit's Decision Conflicts with Decisions of Other Circuits.

The Fourth Circuit takes an expansive view of the *Younger* abstention doctrine that is in conflict with other circuits in two ways. First, it is deferential to the district court, reviewing the decision whether to abstain for abuse of discretion. Second, it binds the federal court to state court precedent and eliminates a federal statutory remedy for the sanction-variety of double jeopardy claim, by requiring the claimant to take the claim through the state system and ultimately petition the state's highest court to exercise discretionary review and reverse itself and this Court for discretionary review.

Other circuits apply a *de novo* standard of review. *See Canatella v. State of California*, 304 F.3d 843, 850 (9th Cir. 2001); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1242 (10th Cir. 2001); *Associated General Contractos of Ohio, Inc. v. Drabik*, 214 F.3d 730, 739 (6th Cir. 2000); *Schlager v. Phillips*, 166 F.3d 439, 441 (2d Cir. 1999); *Brooks v. New Hampshire*, 80 F.3d 633, 637 (1st Cir. 1996). *See also Riley v. Simmons*, 45 F.3d 764, 770 (3d Cir. 1995) (district court's analysis is subject to *de novo* review).

In other circuits, abstention is not appropriate where binding state precedent makes submitting the federal rights to a state forum futile. *W.P. v. Poritz*, 931 F. Supp. 1187, 1197 (D.N.J. 1996); *Bongiorno v. Lalomia*, 851 F. Supp. 606, 613 (D.N.J.), *aff'd without opinion*, 39 F.3d 1168 (3d Cir. 1994); *Tolbert v. City of Memphis*, 568 F. Supp. 1285, 1289-90 (W.D. Tenn. 1983); *Mastin v. Fellerhoff*, 526 F. Supp. 969, 971 (S.D. Ohio 1981); *McKinstry v. Genesee County Circuit*, 669 F. Supp. 801, 805-06 (E.D. Mich. 1987).

**B. The Court of Appeal's Decision Is Incorrect.**

The court of appeal's decision conflicts with this Court's most recent sanctions-variety double jeopardy case. In *Hudson v. United States*, 522 U.S. 93, 95 (1997), an "administratively imposed" sanction followed by indictment "for essentially the same conduct" raised a colorable double jeopardy claim that was determined before trial on the indicted charges. An "administratively imposed" sanction followed by indictment "for essentially the same conduct" raises a colorable double jeopardy claim that should be determined before trial on the indicted charges. *Hudson v. United States*, *supra*, at 95 (interlocutory appeal before trial). Under *Hudson*, jeopardy attached when the sanction was imposed, thereby giving rise to the question of whether the sanction was a criminal penalty that shielded the defendant from the subsequent prosecution. *See also Ex parte Lange*, 85 U.S. 163, 176, 178-79 (1873) (payment of the fine precluded imposition of prison term). The lack of any trial concerning the sanction was irrelevant.

Once the state's highest court has staked out its position on the issue, "there is no further bar to the assumption of federal jurisdiction, for the deference owed to the state judicial system demanded by the principles of comity and federalism has been paid." *Drayton v. Hayes*, 589 F.2d 117, 120 (2d Cir. 1979). This Court in *Younger v. Harris* was not faced with a prior decision by the state's highest court and did not look to the likelihood of success on the merits of the federal constitutional claim in determining whether to abstain from considering the merits of the claim. 401 U.S. 37 (1971). The inquiry, instead, is into the status of the issue under state law so as to accord the state the opportunity to interpret its own statute under the federal law at issue. In the instant case,

that inquiry shows that the state has been afford the opportunity to interpret its drug tax and has staked out its position on the federal double jeopardy claim. The interests of comity and federalism have been satisfied.

The court of appeal's conclusions as to the amended drug tax rest primarily on the tax rate and secondarily on the belief that the amended drug tax is neither conditioned on a criminal offense nor evidence of guilt in a subsequent prosecution. The tax rate was a significant factor under *United States v. Halper*, 490 U.S. 435 (1989), but *Halper* was abrogated by this Court in *United States v. Hudson*, 522 U.S. 93, 95 (1997). The court of appeals does not explain how the possession that triggers the drug tax is not also a criminal offense, thereby conditioning the tax on a criminal offense. The court of appeals did not analyze either of the two secondary amendments under the *Kennedy/Ward* factors applied in *Lynn* to the drug tax. There is no case law to support the proposition that excluding from evidence a prior conviction or sanction permits a second conviction for the same offense.

The court of appeals disregarded this Court's reasons in *Hudson v. United States* for overruling the "sanctions actually imposed" method used in *Halper*, namely, that requiring the defendant to "proceed through a trial to judgment" on a civil sanction to find out what the actual sanction is "flies in the face of the notion that the Double Jeopardy Clause forbids the government from even '*attempting* a second time to punish criminally.' " *Hudson v. United States*, 522 U.S. 93, 101-102 (1997) (quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938).

## C. The Court of Appeal's Decision May Cause Serious Adverse Consequences.

The court of appeal's decision has the potential to create serious adverse consequences. The court has taken the *Younger* abstention doctrine in an unexpected direction that grafts a likelihood of success standard to the doctrine and creates a category of federal constitutional rights – the sanction-variety of double jeopardy claims – for which no federal statutory remedy is available.

The court of appeal's decision disregards this Court's reasons in affirming abstention in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). In *Middlesex* the plaintiff was required to exhaust the state's remedies because the state had adopted a rule allowing interlocutory appeal of federal constitutional claims to the state's highest court. No such rules are in place in North Carolina for the federal double jeopardy claim raised by Nivens, Maners, and Stork. The State of North Carolina does not provide for interlocutory appeal of pre-trial motions raising double jeopardy claims. N.C.G.S. § 15A-1444(a) (defendant can appeal after final judgment is entered); N.C.G.S. § 7A-27(b) (defendant can appeal after final judgment entered); *State v. Shoff*, 118 N.C. App. 724 (1995); *State v. Joseph*, 92 N.C. App. 203 (1988).

The consequence of the court's decision will be to increase the amount of disruption to the state proceeding. Nivens, Maners, and Stork will file their pretrial motion in state court and the state court will summarily reject it. The court acknowledges that state courts have summarily rejected double jeopardy claims in post-amendment cases in the past, which they obviously would since under state law

the drug tax never was a penalty. The state court and prosecutor will be ready to proceed to trial at that time, but Nivens, Maners, and Stork will re-file their § 1983 claim in federal court raising their federal double jeopardy claim once again. Thus, the court of appeals requires the parties to duplicate the process that has interrupted the state criminal proceeding and the parties' lives. This duplicative effort is costly and disruptive of the lives and functions of the parties and serves no purpose. Whatever benefits, if any, from this process would be far outweighed by the costs, including disruption of a state criminal proceeding.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND FILED FEBRUARY 11, 2003**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-1176

KENNETH SCOTT NIVENS,
Individually and as representatives of a class
Pursuant to Rule 23, Fed. R. Civ. P.;
GLEN LANCE MANERS,
Individually and as representatives of a class
Pursuant to Rule 23, Fed. R. Civ. P.;
TERRI LYNN STORK,
Individually and as representatives of a class
Pursuant to Rule 23, Fed. R. Civ. P.;

Plaintiffs-Appellants

v.

PETER S. GILCHRIST, III,
In his official capacity as District Attorney
For the 26th Prosecutorial District
For the State of North Carolina,
And as representative of a class
Pursuant to Rule 23, Fed. R. Civ. P.,

Defendant-Appellee

[Filed February 11, 2003]

*Appendix A*

Before: WILLIAMS, MOTZ, and KING, Circuit Judges.

WILLIAMS, Circuit Judge:

Appellants Kenneth Scott Nivens, Glen Lance Maners, and Terri Lynn Stork brought an action in the United States District Court for the Western District of North Carolina, pursuant to 42 U.S.C.A. § 1983 (West Supp. 2002) and the Federal Declaratory Judgment Act, 28 U.S.C.A. §§ 2201 and 2202 (West 1994), to enjoin the pending state criminal drug prosecutions against them, alleging that their payment of the North Carolina's drug tax was a criminal, not civil, penalty, and thus any criminal punishment imposed in their pending criminal trial will violate the Double Jeopardy Clause of the Fifth Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment. The district court abstained from exercising jurisdiction and intervening in the state proceedings based on *Younger v. Harris*, 401 U.S. 37 (1971), which reaffirmed the principle that a federal court "should not act to restrain a [state] criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id.* at 43-44. The district court concluded that Appellants had not exhausted their state remedies and that they would not suffer irreparable damage if the state action was not enjoined because Appellants had yet to be subjected to a criminal prosecution. For the reasons that follow, we affirm the district court's decision to abstain.

The underlying facts in this case are not in dispute. On July 8, 2000, Appellants were arrested for various violations of the North Carolina Unauthorized Substances

Act relating to the sale of 1024 ecstasy pills. Shortly thereafter, North Carolina assessed taxes for possession of the drugs, including penalties and interest, totaling $8,677.13,[1] pursuant to North Carolina's Unauthorized Substances Tax Act, N.C. Gen. Stat. §§ 105-113.105, *et seq.* (2000).[2] Within a month or so, Appellants paid the taxes in full and without contest. Subsequently, North Carolina indicted Appellants for possession, sale, delivery, and transportation of, and conspiracy to sell and deliver, an unauthorized substance and scheduled a criminal trial for the November 5, 2001 term of the Superior Court of North Carolina.[3] On October 29, 2001, Appellants filed a motion for a temporary restraining order and a preliminary injunction in the district court to stay their trial. North Carolina voluntarily stayed Appellants' prosecution until January 2002 to allow Appellants adequate time to raise their contentions before the district court, and we issued a stay of the district court's order pending the outcome of this appeal. Because we now affirm the district court's decision to abstain from exercising jurisdiction, we lift our stay.

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1. Appellants Nivens, Maners, and Stork were jointly assessed, respectively, $6,259.67, for the possession of 700 and the sale and possession of 184 pills, and Maners was additionally assessed $1,336.33 for the sale of 184 of these ectasy pills Stork was additionally assessed $1,081.13 for the sale of another 140 ecstasy pills.

2. We refer to the Unauthorized Substances Tax Act, N.C. Gen. Stat. §§ 105-113.105, *et seq.* (2000), as North Carolina's "drug tax" throughout the opinion.

3. Appellants named Peter S. Gilchrist, III, the District Attorney for the Twenty-Sixth Prosecutorial District of North Carolina, as Respondent in his petition. For ease of reference we refer to Gilchrist as "North Carolina" throughout the opinion.

*Appendix A*

II.

A.

The sole issue on appeal is whether the district court properly abstained from exercising jurisdiction under *Younger*, thus declining to reach Appellants' Fifth Amendment claims under the Double Jeopardy Clause.[4] We review the district court's decision to abstain under Younger for abuse of discretion. *Martin Marietta Corp. v. Md. Comm'n on Human Rel.*, 38 F.3d 1392, 1396 (4th Cir. 1994); *see also Freeman v. Case Corp.*, 118 F.3d 1011, 1014 (4th Cir. 1997) (noting that an error of law constitutes an abuse of discretion).

Based upon principles of federalism, the Supreme Court in *Younger* articulated the policy of comity underlying the federal courts' obligation to refrain from adjudicating the merits of federal constitutional claims in an underlying state

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4. The Fifth Amendment's Double Jeopardy Clause states, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The Supreme Court has recognized that the Double Jeopardy Clause protects individuals from being criminally prosecuted more than once for the same offense. *See Monge v. California*, 524 U.S. 721, 727-28 (1998). Protection from subsequent of "successive" criminal prosecutions extends to any party who has already been the subject of a criminal prosecution for the same offense, regardless of the result of the first criminal prosecution. *Id.* at 729. The Court has also concluded that the Double Jeopardy Clause protects individuals from the imposition of "multiple criminal punishments for the same offense," but "only when such occurs in successive proceedings." *Hudson v. United States*, 522 U.S. 93, 99 (1997).

criminal action: adjudicating such claims needlessly injects federal courts into ongoing state criminal prosecutions, undermines the state's ability to enforce its laws, and does not show "a proper respect for state functions." *Younger*, 401 U.S. at 44. The Court also recognized that federal courts acting as courts of equity in this context "should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id.* at 43-44. Later, in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), the Court held that a federal court should abstain from interfering in a state proceeding, even though it has jurisdiction to reach the merits, if there is (1) an ongoing state judicial proceeding, instituted prior to any substantial progress in the federal proceeding; that (2) implicates important, substantial, or vital state interests; and (3) provides an adequate opportunity for the plaintiff to raise the federal constitutional claim advanced in the federal lawsuit. *Id.* at 432; *Martin Marietta Corp.*, 38 F.3d at 1396 (stating the same considerations).

All three of the circumstances identified in the Middlesex inquiry are present here. First, Appellants instituted this lawsuit in an effort to stop, and eventually dismiss, North Carolina's pending criminal proceedings against them. Second, North Carolina has a very important, substantial, and vital interest in preventing violations of its criminal laws. *See Younger*, 401 U.S. at 43-44; *see also Cooper v. Oklahoma*, 517 U.S. 348, 367 (1996) (noting that "the State's interest in the efficient operation of its criminal justice system" is an "important state interest[]"). Third, as is discussed below, infra at 12-17, Appellants have an adequate opportunity in

the state prosecution to raise the double jeopardy claim advanced in the federal lawsuit, although they assert that it would be futile. The district court, accordingly, did not abuse its discretion in abstaining from hearing Appellants' case, unless the case falls under an exception to the general principle requiring abstention.

B.

The Supreme Court has recognized that in "extraordinary circumstances," federal courts have discretion to disregard the "strong federal policy against federal court interference with pending state judicial proceedings." *Middlesex County Ethics Comm.*, 457 U.S. at 431, 102 S. Ct. 2515. In *Younger*, the Supreme Court explained the exception to this "strong federal policy":

> "[W]hen absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done, *except under extraordinary circumstances, where the danger of irreparable loss is both great and immediate.* Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the state, and must decide when and how this is to be done. *The accused should first set up and rely on his defense in the state courts*, even though this involves a challenge of the validity of some statute, *unless it plainly*

*appears that this course would not afford adequate protection.*"

*Younger*, 401 U.S. at 44, 91 S. Ct. 746 (emphasis added) (quoting *Fenner v. Boykin*, 271 U.S. 240, 243-44, 46 S. Ct. 492, 70 L. Ed. 927 (1926)); *see also Kugler v. Helfant*, 421 U.S. 117, 123-24, 95 S. Ct. 1524, 44 L. Ed. 2d 15 (1975) (holding that federal equitable intervention in a state trial may be warranted upon a showing of "bad faith or harassment by state officials," "where the state law to be applied in the criminal proceeding is flagrantly and patently violative of express constitutional prohibitions," or where "other extraordinary circumstances" exist that present the necessary threat of irreparable injury). Thus, a federal court must abstain from interfering with an ongoing state proceeding where a litigant has "an 'opportunity to raise and have timely decided by a competent state tribunal the federal issues involved' and . . . no bad faith, harassment, or other exceptional circumstances dictate to the contrary." *Middlesex*, 457 U.S. at 437, 102 S. Ct. 2515 (quoting *Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973)).

Appellants do not claim that their prosecution was undertaken with the intent to harass or because of any bad faith. Nor do they claim that they have exhausted their avenues for relief in the state court proceeding. *See Huffman v. Pursue Ltd.*, 420 U.S. 592, 608-10 & N. 21, 95 S. Ct. 1200, 43 L. Ed. 2d 482 (1975) (requiring, for a federal court to assert jurisdiction over federal issues under 42 U.S.C.A. § 1983 in a pending state action, exhaustion of state appellate remedies "unless [the claimant] can bring himself within one of the exceptions specified in *Younger*"). Accordingly, for a

federal court to disregard the mandates of *Younger*, Appellants must show extraordinary circumstances demonstrating that they do not have an adequate remedy at law and the danger of irreparable injury if they are denied equitable relief is both great and immediate. *Younger*, 401 U.S. at 44, 91 S. Ct. 746. As is discussed below, we conclude that Appellants cannot establish either.

C.

1.

Appellants first contend that *Younger* is inapplicable because, they assert, it "plainly appears" that the courts of North Carolina will "not afford" them "adequate protection." *Younger*, 401 U.S. at 44, 91 S. Ct. 746. They concede that they have pretrial avenues in which they can raise their double jeopardy claims in state court, but they argue that because the North Carolina Supreme Court has already decided that North Carolina's pre-1995 amendment drug tax[5] *is not* a criminal penalty, *see State v. Ballenger*, 123 N.C. App. 179, 472 S.E.2d 572 (1996), *aff'd*, 481 S.E.2d 84 (N.C. 1997) (*per curiam*), any contrary argument in a North Carolina state court would be futile. Further, Appellants note that this court has determined that North Carolina's pre 1995 amendment

5. Because the General Assembly of North Carolina has amended the drug tax law several times since the courts in *State v. Ballenger*, 345 N.C. 626, 481 S.E.2d 84 (1997), and *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998), considered it, *see infra* at 156-157, we refer to the drug tax law in force at the time of *Ballenger* and *Lynn* as the "pre-1995 amendment drug tax" and the drug tax law after the amendments as the "post- amendments drug tax."

drug tax *is* a criminal penalty. *See Lynn v. West*, 134 F.3d 582, 593-94 (4th Cir. 1998). The disagreement between the North Carolina courts and this court, Appellants assert, demonstrates that North Carolina will violate their federal constitutional rights and, thus, will not afford them adequate protection. As discussed below, we conclude that because neither the Fourth Circuit nor the North Carolina Supreme Court has ever analyzed the post-amendments drug tax under which Appellants were assessed their taxes to determine if it is a criminal punishment, Appellants cannot demonstrate that the North Carolina courts will plainly not afford them adequate protection.

The decisions in *Ballenger* and *Lynn* were based on an analysis of *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 783, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994). In *Kurth Ranch* the United States Supreme Court determined that Montana's tax on illegal drugs was so fundamentally punitive that it was actually a criminal punishment such that an assessment of the drug tax, after a criminal penalty had already been imposed, violated the Double Jeopardy Clause by imposing an unconstitutional second punishment. *Id.* at 783, 114 S. Ct. 1937. Montana characterized its law as civil, but the Court determined that it was actually a "second punishment" for double jeopardy purposes by looking at four features: "(1) the high tax rate, (2) the deterrent purpose of the tax, (3) the fact that the tax was conditioned on the commission of a crime, and (4) the fact that the tax was levied on 'possession of goods that no longer exist and that the taxpayer never lawfully possessed.' "

*Lynn*, 134 F.3d at 589 (quoting Kurth Ranch, 511 U.S. at 780-84, 114 S. Ct. 1937).[6]

In *Ballenger*, 481 S.E.2d at 84, the North Carolina Supreme Court affirmed, without comment, an appellate court decision holding that North Carolina's pre 1995 amendment drug tax did not have "such fundamentally punitive characteristics as to render it violative of the prohibition against multiple punishments [under] the Double Jeopardy Clause," *Ballenger*, 472 S.E.2d at 575. The North Carolina appellate court reviewed the pre-1995 amendment drug tax and concluded that it was not as punitive as Montana's drug tax in *Kurth Ranch* and not a criminal penalty because:

> the North Carolina tax becomes payable within forty-eight hours after the taxpayer comes into possession of the substance [and] is not a tax on confiscated goods, as was the case with the Montana tax, which became due only upon the taxpayer's arrest for possession of the substance. To the contrary, the dealer is not required . . . to disclose his or her identity . . . and any information obtained . . . is confidential and cannot be used in a criminal prosecution. . . .

*Id.* at 575.

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6. *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994), did not involve the issue of *Younger* abstention because the underlying dispute occurred in a federal bankruptcy proceeding and went to the Supreme Court on direct review from the Ninth Circuit Court of Appeals, *id.* at 773-75, 114 S. Ct. 1937.

*Appendix A*

After the *Ballenger* decision, we construed the same pre-1995 amendment drug tax and concluded that it was a criminal penalty because:

> the [d]rug [t]ax contains no features that allow us to distinguish *Kurth Ranch*. The rate of taxation is even steeper than the tax in *Kurth Ranch*. Unlike the application of a normal income tax on illegal activity, the [d]rug [t]ax is enforced only against criminals. . . . [T]he [d]rug [t]ax does not contemplate lawful dealings in the product that is the subject of the tax. The [d]rug [t]ax singles out a class of persons who have engaged in criminal activity and subjects the class to a rate of taxation far beyond that faced by any legitimate taxpayer.

*Lynn*, 134 F.3d at 592.[7]

In 1995, 1997, and again in 1998, before North Carolina assessed the drug tax on Appellants, the General Assembly of North Carolina, partially in response to the Supreme Court's decision in *Kurth Ranch* and our decision in *Lynn*, dramatically altered its drug tax. For example, in 1995, the General Assembly (1) made the drug tax payable upon receipt

7. Although we did address in *Lynn* whether North Carolina's pre-1995 amendment drug tax was a criminal punishment under *Kurth Ranch*, as applied to the individuals in that case, we did not address *Younger* abstention or double jeopardy because *Lynn* involved a federal drug prosecution and a challenge to a subsequent assessment of the state drug tax. *Lynn*, 134, F.3d 582, 583-88 (1998) (determining that North Carolina's pre 1995 amendment drug tax was a criminal penalty that could not be imposed without constitutional safeguards that attach to criminal proceedings).

of drugs rather than upon a criminal violation; (2) lowered the tax on various drugs; (3) repealed the section that made the violation of the drug tax a Class I felony; and (4) lowered the interest and penalty applicable when a dealer fails to pay the tax within 45 days of receiving the drugs from 100% to 50%. *See* N.C. Gen. Stat. §§ 105- 113.106, -113.107, -113.110, 113.110(A) (1994), *amended by* An Act to Revise the Controlled Substance Excise Tax, Ch. 340, H.B. No. 123 (1995). In 1997, the General Assembly included previously unaccounted for substances, such as mash and other illicit beverages. *See* N.C. Gen. Stat. §§ 105-113.106, - 113.107 (1996), *amended by* An Act to Levy an Excise Tax on Illicit Spirituous Liquor, an Excise Tax on Mash, and an Excise Tax on Illicit Mixed Beverages, N.C. Sess. Laws 1997-292 (1997). In 1998, the General Assembly (1) lowered the rate at which it taxed cocaine from $200 per gram to $50 per gram; (2) lowered the rate at which it taxed drugs based on dosage units from $400 per 10 dosage units to $200 per 10 dosage units; and (3) completely abolished the special penalty and interest section and replaced it with the general interest and penalty provisions applicable to all taxes paid in North Carolina, effectively reducing the penalty for late payment from 50% to 10-40%. *See* N.C. Stat. §§ 105-113.107, -113.110A (1997), *amended by* An Act to Amend the Excise Tax on Controlled Substances, N.C. Sess. Laws 1998- 218 (1998). As part of the 1998 amendments, the General Assembly expressly stated:

> Whereas, the intent of the General Assembly in enacting this tax continues to be to raise revenue through a civil tax on this highly profitable activity . . . [and] not to create a criminal penalty . . .

*Appendix A*

> Whereas, upon . . . challenge in the federal courts, the controlled substance tax was found in 1998 to be a criminal penalty . . . Whereas, it is, therefore, the intent of the North Carolina General Assembly to modify the tax in accordance with [*Lynn* ], so that the tax may continue to be assessed in a manner consistent with the law as interpreted [in *Lynn* ].

An Act to Amend the Excise Tax on Controlled Substances, N.C. Sess. Laws 1998-218 (1998).

Neither North Carolina's *Ballenger* decision nor our decision in *Lynn* addressed North Carolina's amended drug tax, which is at issue in this case, because both cases involved tax assessments before 1995.[8] In fact, no court[9] has

8. Although our decision in *Lynn* cites to the 1996 version of North Carolina's drug tax, we clearly interpreted North Carolina's pre-1995 amendment drug tax. *See, e.g., Lynn*, 134 F.3d at 590 (discussing the 100% penalty applicable to late payments of the drug tax). As stated in the text, the General Assembly of North Carolina modified the penalty provision for late payment in 1995 from a 100% to a 50% penalty and in 1998 reduced the penalty to 10-40%. *See supra* at 156-157.

9. Lower courts in North Carolina have decided cases where local authorities had assessed the post-amendments drug tax. The courts in these cases, however, have not discussed the 1995, 1997, or 1998 amendments and have not addressed whether the post-amendments drug tax contains the punitive characteristics necessary render it a criminal penalty under *Kurth Ranch*. Rather, the courts relied on North Carolina's Supreme Court ruling in *Ballenger* and

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considered whether North Carolina's post- amendments drug tax provides the "the clearest proof" of punitive purpose or effect necessary to override the General Assembly's intent to create a civil law and transform it into a criminal penalty. *Hudson v. United States*, 522 U.S. 93, 99-100, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997) (holding that "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty") (internal citations omitted).[10] Based on the wide-

(Cont'd)
summarily held, without comment, that the drug tax is not a criminal penalty. *See, e.g., State v. Crenshaw*, 144 N.C. App. 574, 551 S.E.2d 147, 151 (2001) (stating that *Lynn* "is not binding on our State courts" and overruling a double jeopardy objection on that basis). Regardless, even if North Carolina's pre 1995 amendment drug tax and post-amendments drug tax were substantially the same, the North Carolina Supreme Court is not bound by its prior decision and can overturn it. *See Leonard v. Hammond*, 804 F.2d 838, 840-41 (4th Cir. 1986).

10. Under *Hudson*, to determine whether a sanction is a civil or criminal penalty, a court must (1) "ask whether the legislature 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other,' " *Hudson*, 522 U.S. at 99, 118 S. Ct. at 493 (quoting *United States v. Ward*, 448 U.S. 242, 248, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980)), and then, if the sanction was intended to be civil in nature, (2) " 'inquir[e] further whether the statutory scheme was so punitive either in purpose or effect' as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty,' " *id.* (quoting *Ward*, 448 U.S. at 248-49, 100 S. Ct. 2636, and *Rex Trailer Co. v. United States*, 350 U.S. 148, 154, 76 S. Ct. 219, 100 L.Ed. 149 (1956)). This second inquiry is guided by the factors discussed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963),
(Cont'd)

ranging amendments to the drug tax and the fact that Appellants make no claim that the amendments were insubstantial, we decline to hold that North Carolina's post-amendments drug tax is sufficiently similar to the pre 1995 amendment drug tax such that we should treat them the same.[11] Simply put, an assertion that the North Carolina

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and " 'considered in relation to the statute on its face,' " *Hudson*, 522 U.S. at 99, 118 S. Ct. at 493 (quoting *Kennedy*, 372 U.S. at 169, 83 S. Ct. 554). The Court noted, "important [ly] . . . , [that] only 'the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (quoting *Ward*, 448 U.S. at 249, 100 S. Ct. 2636). Although *Hudson*, 522 U.S. at 101-02, 118 S. Ct. 488, expressly overruled the method of analysis in *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), on which *Kurth Ranch* relied, we recognized in *Lynn* that Hudson's " 'clearest proof' " requirement "does not appear to make the challenger's burden any tougher than it already was." *See Lynn*, 134 F.3d at 592 n.10 (quoting *Hudson*, 522 U.S. at 99, 118 S. Ct. at 493).

11. For example, under North Carolina's pre-1995 amendment drug tax, the plaintiff in *Lynn* was assessed $389,000 for possession of 970 grams of cocaine. *See Lynn*, 134 F.3d at 584 (calculating a $200 per gram tax plus a 100% penalty plus $1,125 interest). Under North Carolina's post-amendments drug tax, the same 970 grams of cocaine would only be assessed approximately $67,920 ($50 per gram plus a 40% penalty), which would be approximately one-sixth of the assessed amount. Likewise, in the instant case, Appellants would have been assessed approximately $48,400 for their 1208 ecstasy pills under North Carolina's pre-1995 amendment drug tax ($200 per 10 dosage units plus a 100% penalty) while they were in fact only assessed $8,667.13 under the post-amendments drug tax
(Cont'd)

courts will likely decide a constitutional issue in a way contrary to what Appellants believe the Constitution mandates is not a sufficient basis to avoid application of *Younger* abstention. *See Leonard v. Hammond*, 804 F.2d 838, 840-41 (4th Cir. 1986) (noting that futility was not demonstrated by a North Carolina Supreme Court ruling because the North Carolina Supreme Court could modify or reverse a prior holding). Because our decision in *Lynn* and the North Carolina cases Appellants cite are not controlling for their situation, Appellants cannot demonstrate the type of futility that must be established to justify federal court intervention in an ongoing state proceeding.[12]

2.

Appellants argue in the alternative that *Younger* abstention is inappropriate under the reasoning of *Gilliam v. Foster*, 75 F.3d 881, 903 (4th Cir. 1996) (en banc) (*Gilliam*

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($50 per 10 dosage units plus a 40% penalty), which is approximately one-sixth of what would have been assessed under the pre-1995 amendment drug tax. Moreover, the post-amendments drug tax is not conditioned on a criminal offense, and payment of the tax cannot be used to criminally prosecute the taxpayer.

12. We have acknowledged, albeit in the habeas corpus context, that North Carolina's decisions holding that the pre-amendment drug tax was distinguishable from the tax in *Kurth Ranch* are not objectively unreasonable. *See Vick v. Williams*, 233 F.3d 213, 220-22 (4th Cir. 2000) (holding in a habeas challenge under § 2254 that North Carolina's decisions upholding the pre-amendment drug tax as non-criminal were not an objectively unreasonable interpretation of federal law).

*III*). Specifically, they contend that *Gilliam III* stands for the proposition that the mere allegation of "a colorable claim" of a double jeopardy violation is sufficient to establish exceptional circumstances warranting federal court intervention without any separate showing. *Gilliam III*, 75 F.3d at 904. Finding Appellants' reliance on *Gilliam III* misplaced, we reject their overly expansive interpretation of that case.

In *Gilliam III*, petitioners argued that because a state trial judge granted a mistrial over their objection and in the absence of manifest necessity during their first trial, subjecting them to a second criminal prosecution would violate their rights under the Double Jeopardy Clause. We did not hold that an allegation of a double jeopardy violation automatically precludes *Younger* abstention. Rather, after detailing the well-settled double jeopardy jurisprudence protecting individuals against successive prosecutions for the same offense, we concluded that petitioners' allegations established a substantial likelihood of an irreparable double jeopardy violation. *Id.* at 893-95. We expressly based our decision not to abstain under *Younger* on the fact that a "portion of the constitutional protection [the Double Jeopardy Clause] affords would be irreparably lost if Petitioners were forced to endure *the second trial* before seeking to vindicate their constitutional rights at the federal level." *Id.* at 904 (emphasis added); *see also Abney v. United States*, 431 U.S. 651, 660, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977) (concluding that the protection from multiple trials for the same offense afforded by the Double Jeopardy Clause "would be significantly undermined if appellate review were postponed until after conviction and sentence").

In contrast, Appellants have presented a much less compelling argument that absent federal court intervention, they will suffer an immediate and irreparable constitutional deprivation. *See e.g.*, *Younger*, 401 U.S. at 44, 91 S. Ct. 746. Unlike the defendants in *Gilliam III*, Appellants yet have access to pretrial avenues in their current criminal prosecutions whereby they may raise their constitutional contentions before any double jeopardy injury could inure. *See supra* at 153; *see also* N.C. Gen. Stat. § 15A- 952(a) (2001) ("Any defense, objection, or request which is capable of being determined without the trial of the general issue may be raised before trial by motion."); *Gilliam III*, 75 F.3d at 889 (noting that the defendants had filed a motion to dismiss on double jeopardy grounds in the state courts prior to their second trial and appealed the denial of that motion to the South Carolina Supreme Court before invoking federal jurisdiction); *cf. Gerstein v. Pugh*, 420 U.S. 103, 107-08 n.9, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (finding state forum inadequate because there was no preliminary hearing at which plaintiffs could present constitutional claims as to pretrial conditions). Because jeopardy does not attach during pretrial procedures and motions, *Crist v. Bretz*, 437 U.S. 28, 50, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978) ("[I]t has never been held that jeopardy attaches as of the making or deciding of pretrial motions."), and Appellants have state procedures whereby they may foreclose a violation of their double jeopardy rights, any double jeopardy harm at this stage of Appellants' litigation is neither immediate nor irreparable. Appellants must raise their contentions in their current prosecution and appeal any undesirable decision before a

federal district court asserts jurisdiction.[13] *See Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 302, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984) (noting that the defendant had filed a pretrial motion to dismiss and appealed it to the Massachusetts Supreme Court before invoking federal jurisdiction); *Willhauck v. Flanagan*, 448 U.S. 1323, 1325-26, 101 S. Ct. 10, 65 L. Ed. 2d 1147 (1980) (Brennan, Circuit Justice) (denying consideration of a writ of certiorari for a claim based on double jeopardy due to a lack of "irreparable harm" because "once jeopardy [attaches for the first time], [a defendant] should . . . make his claim before the [state] trial judge [in his second trial], at which time the courts can give due consideration to his claim"). Because Appellants have not made a showing of an immediate and irreparable constitutional injury absent federal court intervention, *Gilliam III* does not permit us to disregard *Younger*.

We also note that Appellants have not shown a "great" or "substantial" likelihood that they will suffer any

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13. Because Appellants have pretrial avenues to raise their double jeopardy claim before the North Carolina courts, we need not resolve the issue of whether a federal district court should exercise its jurisdiction over Appellants' claim once they have exhausted North Carolina's pre-trial procedures. *See Younger v. Harris*, 401 U.S. 37, 46, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971) ("[I]n view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is both great and immediate. . . . Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense to a single criminal prosecution.").

constitutional deprivation. *See, e.g., Younger*, 401 U.S. at 45 (holding that "danger of irreparable loss [must be] great and immediate"); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983) (holding that a "*substantial and immediate irreparable* injury" is a precondition to invoking the exceptional circumstances exception to *Younger* abstention). For Appellants to establish that their prosecution violates double jeopardy by exposing them to multiple criminal punishments, they must prove: (1) that the payment of the drug tax was a criminal penalty; (2) that took place in a separate proceeding; (3) for the same offense for which they are now being prosecuted. *See Hudson*, 522 U.S. at 98, 118 S. Ct. 488 (setting forth test for double jeopardy violation based upon multiple punishments). As is set forth below, there are numerous, significant impediments to Appellants' ability to make this showing.

Initially, it is arguable whether the current version of North Carolina's drug tax constitutes criminal punishment within the meaning of *Hudson. See Hudson*, 522 U.S. at 98, 118 S. Ct. 488 (concluding that administrative sanctions were not sufficiently punitive and, therefore, were not criminal penalties for purposes of double jeopardy); *see also Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (discussing role of statutory construction in determining whether penalty is civil or criminal under *Hudson*); *see generally* Lisa Melenyzer, *Double Jeopardy Protections from Civil Sanctions after Hudson v. United States*, 89 J. Crim. L. & Crim. 1007, 1009-1011, 1016-23 (1999) (explaining the evolution, criticisms, and limits of the multiple punishment doctrine). Appellants contend that the drug tax is a criminal penalty on the basis of *Lynn.*

We cannot agree that *Lynn* is controlling. As is discussed at length above, *see supra* at 156-158, since *Lynn* was decided, North Carolina has significantly amended its drug tax laws. These amendments have yet to be analyzed to determine whether those portions of the drug tax that were discussed in *Lynn* have been altered such that the drug tax no longer implicates any federal constitutional concern. *See* N.C. Gen. Stat. §§ 105-113.107(a), (2a), -113,110A, - 236.

Assuming *arguendo* that the current drug tax is a criminal penalty, it is not clear that the payment of the drug tax took place in a prior "proceeding" within the meaning of *Hudson*. *See Hudson*, 522 U.S. at 99, 118 S. Ct. 488 (concluding that the Double Jeopardy Clause protects individuals from the imposition of "multiple criminal punishments" for the same offense, but "*only when such occurs in successive proceedings.*"). When Appellants received their drug tax assessment, they simply paid the tax; they apparently did not participate in a hearing or an appearance of any type. Under *Hudson*, if there has been no prior "proceeding," Appellants' current prosecution cannot be successive and, thus, the Double Jeopardy Clause would not be implicated.

Similarly, to the extent that the assessment of the drug tax is part of the current prosecution, and not a separate proceeding, there likely is no double jeopardy restriction on imposing both types of punishment, irrespective of whether the drug tax is deemed a "criminal" punishment. *Missouri v. Hunter*, 459 U.S. 359, 368-69, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983) ("Where . . . a legislature specifically authorized cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct . . .

the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial."); *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981) ("[T]he question of what punishments are constitutionally permissible is no different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution."); *United States v. Studifin*, 240 F.3d 415, 418 (4th Cir. 2001) ("Where the issue is solely that of multiple punishment, as opposed to multiple prosecutions, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."); *United States v. Terry*, 86 F.3d 353, 355 (4th Cir. 1996) ("If [the Legislature] clearly authorizes multiple punishments for the same act or transaction, the Double Jeopardy Clause is not offended when the multiple punishments are imposed after a single trial."); *Cummings v. Evans*, 161 F.3d 610, 614 (10th Cir. 1998) (holding that the double jeopardy inquiry is limited to determining "whether [the] state legislature intended to prescribe cumulative punishments for a single criminal incident, [and] we are bound by a state court's determination of the legislature's intent"). Thus, if the General Assembly of North Carolina contemplated and in fact intended that drug dealers be criminally punished for any drug offenses *and* assessed a tax for any unauthorized substances in their possession, *see* N.C. Gen. Stat. § 105- 113.105 (2000) ("Nothing in this Article may in any manner provide immunity from criminal prosecution for a person who possesses an illegal substance."), there is no double jeopardy bar on North

Carolina prosecuting, and a court imposing, both a criminal punishment and a drug tax assessment in a single proceeding.[14] In sum, we are not persuaded that there is a substantial likelihood that Appellants' prosecution is violative of double jeopardy principles.

None of this is to say that Appellants ultimately will not prevail on their double jeopardy claim. It is only to say that where the alleged double jeopardy violation is far from clear, immediate, or irreparable, the important *Younger* policy of allowing the State to pursue its prosecution free from federal court intervention outweighs the Appellants' interest in having the double jeopardy issue resolved in a federal forum. *Commonwealth of Va. v. Kelly*, 29 F.3d 145, 147-48 (4th Cir. 1994) ("There being little, if any, likelihood that Kelly can succeed on the merits of his federal double jeopardy claim, and the public interests weighing heavily in favor of the Commonwealth's ability to pursue its criminal proceedings free of federal court intervention, the district court erred in staying Kelly's . . . trial. . . ." (internal citations omitted)); *Stevens*, 675 F.2d at 949 (holding that "the *Younger* policy is the weightier when the defendant is not being asked to undergo a second trial"). Thus, in balancing the important policies underlying *Younger*, we conclude that Appellants have not established the existence of a substantial and

14. The Due Process Clause also assures that what punishment is imposed has prior legislative approval. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28-29, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991) (Scalia, J., concurring in judgment) (discussing the breadth of the Due Process Clause and how it is a guarantee of the process provided by the law of the land); *Crist v. Bretz*, 437 U.S. 28, 51, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978) (holding that the Due Process Clause protects against prosecutorial abuse).

immediate danger of irreparable constitutional loss warranting federal court intervention.

III.

In conclusion, the issue before us is not whether Appellants will suffer unconstitutional multiple punishments; rather, it is whether a federal court should intervene into a state court proceeding to decide the federal constitutional issues for the state court. The essence of *Younger* is comity – state courts are equally entitled to, and capable of, interpreting constitutional law:

> [S]ince both federal and state courts have a duty to enforce the Constitution, there is no constitutional basis, in the absence of some demonstrable infirmity in the state judicial process itself, for preferring federal courts to state courts as adjudicators of federal constitutional claims.

1 Laurence H. Tribe, *American Constitutional Law*, § 3-28 at 570 (3d ed. 2000). "Minimal respect for the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights." *Middlesex*, 457 U.S. at 431, 102 S. Ct. 2515. Because Appellants failed to establish any of the exceptions to *Younger*, we conclude that the district court did not abuse its discretion in abstaining from adjudicating Appellants' double jeopardy claim.

*AFFIRMED.*

**APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION DATED AND FILED FEBRUARY 4, 2002**

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

No. 3:01CV582-MU

KENNETH SCOTT NIVENS,
Individually and as representatives of a class
Pursuant to Rule 23, Fed. R. Civ. P.;
GLEN LANCE MANERS,
Individually and as representatives of a class
Pursuant to Rule 23, Fed. R. Civ. P.;
TERRI LYNN STORK,
Individually and as representatives of a class
Pursuant to Rule 23, Fed. R. Civ. P.;

Plaintiffs-Appellants

v.

PETER S. GILCHRIST, III,
In his official capacity as District Attorney
For the 26th Prosecutorial District
For the State of North Carolina,
And as representative of a class
Pursuant to Rule 23, Fed. R. Civ. P.,

Defendant-Appellee

[Filed: February 4, 2002]

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**ORDER**

*Since the beginning of this country's history Congress has, subject to few exceptions, man Vesteda desire to permit state courts to try cases free from interference from federal courts.*[1]

THIS MATTER is before the Court upon Plaintiffs' motion for a temporary restraining order and preliminary injunction ("Motion"), filed October 29th, 2001; Defendant's Response, filed November 14th, 2001; Plaintiffs' Reply as to Preliminary Injunction, filed November 26th, 2001; Defendant's Motion to Dismiss, filed November 14th, 2001; Plaintiff Response to Motion to Dismiss, filed November 26th, 2001; and Defendant's Reply to Plaintiffs' Response to Motion to Dismiss, filed December 4th, 2001.[2]

Plaintiffs have requested this Court to enjoin Mr. Gilchrist from prosecuting the Plaintiffs, who were defendants in trials scheduled for the November 5th, 2001, term of the Superior Court for Mecklenburg County.[3]

1. *Younger v. Harris*, 401 U.S. 37, 43 (1971).

2. By stipulation of the parties, the motion for a temporary restraining and preliminary injunction order was stayed informally when Gilchrist and his office agreed not to try the Plaintiffs before January 2002. (Def.'s Mot. Dig, at 3.) Because the Court finds it currently lacks authority to intervene in this State matter, the motion for a temporary restraining order and preliminary injunction is hereby DENIED for failure to establish jurisdiction.

3. The requested injunction apparently would apply to Mecklenburg County Superior Court case numbers 00CRS3 1384 through 31387; 00CRS28893 through 28895, 28913, 28916, 28917, 28919, 28920; and O1CRS1 16688, and 116689.

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Plaintiffs were arrested on July 8°'. 2000, and charged with violating the North Carolina Controlled Substance Act for allegedly selling ecstasy to undercover agents on different occasions during the summer of 2000. Pursuant to the North Carolina Controlled Substance Tax Act, North Carolina General Statute section 105-2D "drug tax," Plaintiffs were assessed with tax, penalty, and interest, which they paid in full. Having paid this tax, the Plaintiffs were indicted in Superior Court on charges related to the same alleged drug violations and, in the trials described in footnote two, face criminal sentencing if found guilty.

Maintaining that the tax is a criminal, and not civil, penalty, Plaintiffs filed for an injunction based on the premise that if the tax is a criminal penalty, collecting the tax and then instituting a subsequent injunction places the Plaintiffs in double jeopardy. As interpreted by Plaintiffs, North Carolina state law maintains that the drug tax is a civil penalty, while the Fourth Circuit views the tax as criminal. Thus, Plaintiffs' argument runs, there is a conflict in state and federal law, which if resolved by this Court so as to agree that the tax is a criminal penalty, could indicate that the Superior Court proceeding posed a double jeopardy risk. This action, specifically, is brought pursuant to 42 U.S.C. § 1983, the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the Fifth and Fourteenth Amendments to the United States Constitution. Because this Court must abstain from exercising jurisdiction, however, it will not answer questions related to the characterization of the drug tax at this time.

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Plaintiffs move the Court to interfere with a state court proceeding, so federalist principles require the Court to first determine whether it may overcome the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), which generally precludes federal courts from enjoining pending state proceedings. This threshold jurisdictional problem is central to the Motion to Dismiss, and the Court will focus the analysis on that Motion and the responsive pleadings. A federal court cannot raise *Younger sua sponte*, however Defendants pled it in their Motion to Dismiss.

Defendants correctly argue that *Younger* requires this Court to abstain from exercising jurisdiction. In rationalizing the holding that, absent limited exceptions, federal courts do not intervene in state proceedings, Justice Black wrote that restraining federal intervention was integral to protecting the states' right to breathing space; phrased differently:

> [to] avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted. This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better

> and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' . . . [T]he concept [represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our United States, occupies a highly important place in our Nation's history and its future. 401 U.S. at 44-5.

For these reasons, *Younger* only allows four exceptions to the doctrine of nonintervention. *See* 401 U.S. at 43. Of these, only the last pertains to the instant matter: "a judicial exception to the longstanding policy . . . has been made where a person about to be prosecuted in a state court can show that he will, if the proceeding in the state court is not enjoined, suffer irreparable damages." *Id.* The situation at bar does not subject the Plaintiffs to irreparable damages because they are entitled to take advantage of North Carolina's own appellate process, and ultimately of the United States Supreme Court if that tribunal grants certiorari.

Yet Plaintiffs urge that the double jeopardy risk poses the kind of extreme situation where an exception is proper. For this contention, Plaintiffs stand heavily but unsteadily upon *Gilliam v. Foster*, 75 F.3d 881 (4th Cir. 1996). (Pl.'s Resp. Mot. Dis. at 14). *Gilliam* does indeed state that district courts can intervene when there is a double jeopardy problem. Specifically, the logical progression is that the federal court does not intervene, generally, absent "the most narrow and extraordinary circumstances." *Id.* at 903. Intervention is usually proper only when the movant shows "bad faith, harassment, *or any other unusual circumstance that would call for equitable relief.*" *Id.* (quoting and supplying emphasis to *Younger*, 401 U.S. at 54). In *Gilliam*, as in the instant case, there is clearly no bad faith or harassment. The jurisprudential advancement made in *Gilliam* is the holding, having reached this point in the analysis, that "the irreparable deprivation of th[e] Fifth Amendment Double Jeopardy right is an extraordinary circumstance warranting federal court equitable intervention in Petitioner's state criminal proceeding." *Id.* at 904 (and noting in footnote 27 that "Obviously, Petitioners already had been required to defend themselves in one criminal proceeding, and it was their *second criminal trial* from which they sought federal . . . relief."). And it is with this holding – with the recognition that "proceeding" and "trial" are, in this limited sense, interchangeable and necessary for double jeopardy intervention – that *Gilliam's* factual situation and Plaintiffs' part ways.

*Gilliam* turns on the black-letter law that jeopardy attaches when the jury is empaneled and sworn. *See* 75 F.3d 893. In the instant matter, jeopardy has not attached because there has not been a prosecution, no jury has been sworn.

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Rather, a tax was demanded of Plaintiffs, who paid it without resort to an adversarial contest. Jeopardy not having attached even once, there is of course no possibility for it to attach a second time. This matter is, therefore, not an instance of double jeopardy, rendering unripe the question of whether federal courts can intervene in state proceedings to prevent double jeopardy (although the Court recognizes that it could intervene in a situation meeting *Gilliam's* requirements). This is clearly the point that the Fourth Circuit makes when it states in its reasoning for Gilliam that "when the record demonstrates that a second criminal trial will constitute a violation of the defendant's double jeopardy rights, federal court intervention is appropriate." *Id.* at 905 (emphasis supplied). Indeed, after specific inquiry into what the Fifth Amendment means by "double jeopardy," throughout the passages of the opinion where *Younger* is discussed, Judge Wilkins deems that double jeopardy arises from a second trial, and uses the phrase "second trial" repeatedly. In fact defining double jeopardy as connected to a second trial is a major holding of that case. *Gilliam's* outcome is absolutely contingent on the fact that, in that case, a second trial was underway. The mere payment of a tax does not constitute a prosecution, but rather a penalty, so based on this quotation from *Gilliam* the Superior Court trial set for later this month – a first prosecution – appears to be the kind of situation in which the Fourth Circuit would not endorse intervention. If the Plaintiff wants to argue that the drug tax somehow constitutes a prosecution, it should argue the North Carolina legal issue before a North Carolina court.

A sister court discussed this distinction half a decade ago. In *Murphy v. Virginia*, 896 F. Supp. 577, 580 (E.D. Va. 1995), Judge Ellis wrote:

> Younger rests on two separate yet mutually supportive pillars. The first is the traditional equitable principle that "courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." The second and primary rationale underlying the doctrine is comity, the prudential constraints of federalism. (quoting *Younger*, 401 U.S. at 43-44).

Plaintiffs here have an adequate remedy at law. And, since (although they have paid a tax) they have not yet been prosecuted, they are not at risk at least for the kind of irreparable injury described in Gilliam that would arise if there happened to be a double jeopardy issue, a "special circumstance." *Id.* at 581 (citation omitted).

That special circumstance can only happen when a defendant has incurred time, expense, and anxiety through a first trial but has not been vindicated. Before resorting to the federal courts he must see that the state has no remedy for him – that he has hit the impenetrable stone wall where the sidewalk ends and state jurisprudence is finally exhausted, and where state courts have said all they are entitled to say:

> In the context of certain double jeopardy claims, the reasoning is similarly clear: once a

> criminal defendant has fruitlessly pursued all state remedies available to him, "there is no further bar to the assumption of federal jurisdiction, for the deference owed to the state judicial system demanded by principles of comity and federalism has been paid." *Id.* at 582 (quoting *Drayton v. Hayes*, 589 F.2d 117, 120 (2d Cir. 1979).

When a criminal defendant pays a drug tax without trial or contest, and is subsequently prosecuted, the wall he must reach before he can litigate here is still far down the sidewalk. Such is Plaintiffs' situation.

This observation is similar to the crux of the thinking expressed in Murphy, where the court found that subjection to multiple *punishments* was not the same as exposure to multiple prosecutions. *Id.* at 582 (noting the "distinction in the double jeopardy context between cases involving the threat of multiple prosecutions and those involving the thread [sic] of multiple punishments."). Thus, "[i]f an accused is facing multiple convictions (and, therefore, multiple punishments) in violation of the Double Jeopardy Clause, he may appeal those convictions to obtain full relief. If, by contrast, he faces multiple *prosecutions*, neither the second (or third, or fourth) *trial itself* nor an appeal therefrom can provide him with a remedy; the trial itself is the punishment." In the instant matter, Plaintiffs have not yet been put through the inconvenience, or "punishment" as Judge Ellis aptly described it – of a second trial. They have merely paid taxes, a form of punishment which they doubtless could have contested at the time they were levied, or subsequently. If they find the taxes problematic, they can take it up in North

Carolina's judicial system. For even if those taxes are criminal in nature – and this Court will not reach the analysis of whether they are or are not – they are a criminal *penalty*, not a prosecution.

*Younger* is clear that this Court must not intervene "unless it plainly appears that [a] course would not afford adequate state protection." 401 U.S. at 45. For the reasons given, Plaintiffs have not yet taken the actions necessary to demonstrate to this Court that North Carolina has not protected their rights. If Plaintiffs still harbor concerns about the integrity of their Constitutional rights after reaching the wall where state recourse is exhausted, they may of course file again.

IT IS THEREFORE ORDERED that Plaintiffs' action is *dismissed without prejudice* because this Court lacks subject matter jurisdiction under Federal Rules of Civil Procedure 12(b)(1). IT IS FURTHER ORDERED that any remaining outstanding motions are hereby DENIED as moot.

**APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 11, 2003**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-1176

KENNETH SCOTT NIVENS,
Individually and as representatives of a class
Pursuant to Rule 23, Fed. R. Civ. P.;
GLEN LANCE MANERS,
Individually and as representatives of a class
Pursuant to Rule 23, Fed. R. Civ. P.;
TERRI LYNN STORK,
Individually and as representatives of a class
Pursuant to Rule 23, Fed. R. Civ. P.;

Plaintiffs-Appellants

v.

PETER S. GILCHRIST, III,
In his official capacity as District Attorney
For the 26th Prosecutorial District
For the State of North Carolina,
And as representative of a class
Pursuant to Rule 23, Fed. R. Civ. P.,

Defendant-Appellee

[Filed: March 11, 2003]

*Appendix C*

**On Petition for Rehearing and Rehearing En Banc**

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

## APPENDIX D — CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

**1. U.S. Const., amend. V:**

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

**2. 42 U.S.C. § 1983:**

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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**3. N.C.G.S. § 105-113.105. Purpose**

> The purpose of this Article is to levy an excise tax to generate revenue for State and local law enforcement agencies and for the General Fund. Nothing in this Article may in any manner provide immunity from criminal prosecution for a person who possesses an illegal substance.

**4. N.C.G.S. § 105-113.107. Excise tax on unauthorized substances**

> (a) Controlled Substances.—An excise tax is levied on controlled substances possessed, either actually or constructively, by dealers at the following rates:
>
> > (1) At the rate of forty cents (40¢) for each gram, or fraction thereof, of harvested marijuana stems and stalks that have been separated from and are not mixed with any other parts of the marijuana plant.
> >
> > (1a) At the rate of three dollars and fifty cents ($3.50) for each gram, or fraction thereof, of marijuana, other than separated stems and stalks taxed under subdivision (1) of this section.
> >
> > (1b) At the rate of fifty dollars ($50.00) for each gram, or fraction thereof, of cocaine.

(2) At the rate of two hundred dollars ($200.00) for each gram, or fraction thereof, of any other controlled substance that is sold by weight.

(2a) At the rate of fifty dollars ($50.00) for each 10 dosage units, or fraction thereof, of any low-street-value drug that is not sold by weight.

(3) At the rate of two hundred dollars ($200.00) for each 10 dosage units, or fraction thereof, of any other controlled substance that is not sold by weight.

(a1) Weight.—A quantity of marijuana or other controlled substance is measured by the weight of the substance whether pure or impure or dilute, or by dosage units when the substance is not sold by weight, in the dealer's possession. A quantity of a controlled substance is dilute if it consists of a detectable quantity of pure controlled substance and any excipients or fillers.

(b) Illicit Spirituous Liquor.—An excise tax is levied on illicit spirituous liquor possessed by a dealer at the following rates:

(1) At the rate of thirty-one dollars and seventy cents ($31.70) for each gallon, or fraction thereof, of illicit spirituous liquor sold by the drink.

(2) At the rate of twelve dollars and eighty cents ($12.80) for each gallon, or fraction thereof, of illicit spirituous liquor not sold by the drink.

(c) Mash.—An excise tax is levied on mash possessed by a dealer at the rate of one dollar and twenty-eight cents ($1.28) for each gallon or fraction thereof.

(d) Illicit Mixed Beverages.—A tax is levied on illicit mixed beverages sold by a dealer at the rate of twenty dollars ($20.00) on each four liters and a proportional sum on lesser quantities.

**5. N.C.G.S. § 105-113.107A. Exemptions**

(a) Authorized Possession.—The tax levied in this Article does not apply to a substance in the possession of a dealer who is authorized by law to possess the substance. This exemption applies only during the time the dealer's possession of the substance is authorized by law.

(b) Certain Marijuana Parts.—The tax levied in this Artiele does not apply to the following marijuana:

(1) Harvested mature marijuana stalks when separated from and not mixed with any other parts of the marijuana plant.

(2) Fiber or any other product of marijuana stalks described in subdivision (1) of this subsection, except resin extracted from the stalks.

(3) Marijuana seeds that have been sterilized and are incapable of germination.

(4) Roots of the marijuana plant.

**6. N.C.G.S. § 105-113.108. Reports; revenue stamps**

(a) Revenue Stamps. — The Secretary shall issue stamps to affix to unauthorized substances to indicate payment of the tax required by this Article. Dealers shall report the taxes payable under this Article at the time and on the form prescribed by the Secretary. Dealers are not required to give their name, address, social security number, or other identifying information on the form. Upon payment of the tax, the Secretary shall issue stamps in an amount equal to the amount of the tax paid. Taxes may be paid and stamps may be issued either by mail or in person.

(b) Reports. — Every local law enforcement agency and every State law enforcement agency must report to the Department within 48 hours after seizing an unauthorized substance, or making an arrest of an individual in possession of an unauthorized substance, listed in this subsection

upon which a stamp has not been affixed. The report must be in the form prescribed by the Secretary and it must include the time and place of the arrest or seizure, the amount, location, and kind of substance, the identification of an individual in possession of the substance and that individual's social security number, and any other information prescribed by the Secretary. The report must be made when the arrest or seizure involves any of the following unauthorized substances upon which a stamp has not been affixed as required by this Article:

(1) More than 42.5 grams of marijuana.

(2) Seven or more grams of any other controlled substance that is sold by weight.

(3) Ten or more dosage units of any other controlled substance that is not sold by weight.

(4) Any illicit mixed beverage.

(5) Any illicit spirituous liquor.

(6) Mash.

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**7. N.C.G.S. § 105-113.109. When tax payable**

The tax imposed by this Article is payable by any dealer who actually or constructively possesses an unauthorized substance in this State upon which the tax has not been paid, as evidenced by a stamp. The tax is payable within 48 hours after the dealer acquires actual or constructive possession of a non-tax- paid unauthorized substance, exclusive of Saturdays, Sundays, and legal holidays of this State, in which case the tax is payable on the next working day. Upon payment of the tax, the dealer shall permanently affix the appropriate stamps to the unauthorized substance. Once the tax due on an unauthorized substance has been paid, no additional tax is due under this Article even though the unauthorized substance may be handled by other dealers.

**8. § 105-113.111. Assessments**

Notwithstanding any other provision of law, an assessment against a dealer who possesses an unauthorized substance to which a stamp has not been affixed as required by this Article shall be made as provided in this section. The Secretary shall assess a tax, applicable penalties, and interest based on personal knowledge or information available to the Secretary. The Secretary shall notify the dealer in writing of the amount of the tax, penalty, and interest due, and demand its immediate payment. The notice and demand shall

be either mailed to the dealer at the dealer's last known address or served on the dealer in person. If the dealer does not pay the tax, penalty, and interest immediately upon receipt of the notice and demand, the Secretary shall collect the tax, penalty, and interest pursuant to the procedure set forth in G.S. 105-241.1(g) for jeopardy assessments or the procedure set forth in G.S. 105-242, including causing execution to be issued immediately against the personal property of the dealer, unless the dealer files with the Secretary a bond in the amount of the asserted liability for the tax, penalty, and interest. The Secretary shall use all means available to collect the tax, penalty, and interest from any property in which the dealer has a legal, equitable, or beneficial interest. The dealer may seek review of the assessment as provided in Article 9 of this Chapter.

**9. N.C.G.S. § 105-241. Where and how taxes payable; tax period; liens**

. . .

(d) Lien.—This subsection applies except when another Article of this Chapter contains contrary provisions with respect to a lien for a tax levied in that Article. The lien of a tax attaches to all real and personal property of a taxpayer on the date a tax owed by the taxpayer becomes due. The lien continues until the tax and any interest, penalty, and costs associated with the tax are paid. A tax lien is not extinguished by the sale of the taxpayer's property. . . .

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**10. 1998 North Carolina Laws S.L. 1998-218 (S.B. 1554)**

Additions are indicated by <<+ Text +>>; deletions by <<- Text ->>. Changes in tables are made but not highlighted.

S.L. 1998-218

S.B. No. 1554

EXCISE TAX AMENDMENT—CONTROLLED SUBSTANCES

AN ACT TO AMEND THE EXCISE TAX ON CONTROLLED SUBSTANCES.

Whereas, North Carolina enacted the Controlled Substances Tax Act in 1989 for the purpose of levying an excise tax to generate revenue for State and local law enforcement agencies and the General Fund and to collect taxes from persons engaged in a highly profitable activity that had escaped taxation; and

Whereas, the intent of the General Assembly in enacting this tax continues to be to raise revenue through a civil tax on this highly profitable activity; and

Whereas, the intent of the General Assembly in enacting this tax is not to create a criminal penalty, other than for nonpayment of the tax, above and beyond the criminal sanctions in the criminal code; and

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Whereas, upon constitutional challenge on double jeopardy grounds by a defendant who had been assessed for the tax and also convicted of criminal drug charges, the North Carolina Court of Appeals held that the tax "was not predicated upon whether the taxpayer in possession of the controlled substance has been arrested or charged with criminal conduct, nor is it assessed on property that necessarily has been confiscated or destroyed"; and

Whereas, the court further held that the statute "is a legitimate and remedial effort to recover revenue from those persons who would otherwise escape taxation when engaging in the highly profitable, but illicit and sometimes deadly activity of possessing, delivering, selling, or manufacturing large quantities of controlled drugs" and that the statute "does not have such fundamentally punitive characteristics as to render it violative of the prohibition against multiple punishments for the same offense contained in the Double Jeopardy Clause"; and

Whereas, that decision was affirmed on appeal to the North Carolina Supreme Court and not disturbed by the United States Supreme Court; and

Whereas, upon further challenge in the federal courts, the controlled substance tax was found in 1998 to be a criminal penalty, and the United States Supreme Court let the federal ruling stand; and

Whereas, according to law enforcement officials, the current market price of cocaine is approximately $100.00 per gram and hence the excise tax rate proposed by this act

is proportionately less than the tax imposed by the taxing authorities in many states upon cigarettes; and

Whereas, it is, therefore, the intent of the North Carolina General Assembly to modify the tax in accordance with the recent federal court ruling, so that the tax may continue to be assessed in a manner consistent with the law as interpreted by the federal courts; Now, therefore,

The General Assembly of North Carolina enacts:

Section 1. G.S. 105-113.107(a) reads as rewritten:

<< NC ST § 105-113.107 >>

(a) Controlled Substances. — An excise tax is levied on controlled substances possessed, either actually or constructively, by dealers at the following rates:

(1) At the rate of forty cents (40 cents) for each gram, or fraction thereof, of harvested marijuana stems and stalks that have been separated from and are not mixed with any other parts of the marijuana plant.

(1a) At the rate of three dollars and fifty cents ($3.50) for each gram, or fraction thereof, of marijuana, other than separated stems and stalks taxed under subdivision (1) of this section.

<<+(1b) At the rate of fifty dollars ($50.00) for each gram, or fraction thereof, of cocaine.+>>

(2) At the rate of two hundred dollars ($200.00) for each gram, or fraction thereof, of any other controlled substance that is sold by weight.

(2a) At the rate of fifty dollars ($50.00) for each 10 dosage units, or fraction thereof, of any low-street-value drug that is not sold by weight.

(3) At the rate of <<-four hundred dollars ($400.00)->> <<+two hundred dollars ($200.00)+>> for each 10 dosage units, or fraction thereof, of any other controlled substance that is not sold by weight.

<<+(a1) Weight. —+>> A quantity of marijuana or other controlled substance is measured by the weight of the substance whether pure or impure or dilute, or by dosage units when the substance is not sold by weight, in the dealer's possession. A quantity of a controlled substance is dilute if it consists of a detectable quantity of pure controlled substance and any excipients or fillers.

Section 2. G.S. 105-113.110A reads as rewritten:

<< NC ST § 105-113.110A >>

§ 105-113.110A. <<-Interest and penalty.->> <<+Administration.+>>

<<-The tax due under this Article shall bear interest at the rate established pursuant to G.S. 105-241.1(i) from the date due until paid. In addition, a dealer who neglects, fails, or refuses to pay the tax due under this Article is liable for a

penalty equal to fifty percent (50%) of the tax.->> <<+Article 9 of this Chapter applies to this Article.+>>

Section 3. This act is effective when it becomes law.

In the General Assembly read three times and ratified this the 26th day of October, 1998.

Approved 1:58 p.m. this 31st day of October, 1998.